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IN THE

Supreme Court of the United States

October Term, 1961

No. 432

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents,

AMERICAN EXPORT LINES, *et al.*,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner, Empire State Highway Transportation Association, Inc. (herein called "Empire") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled cause on April 27, 1961.

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia, printed in Appendix B hereto, pages 18-29, *infra*, is reported at 291 F. 2d 336. The order of the Federal Maritime Board (herein called the "Board"), which was the subject of review in the Court below, is printed in Appendix B hereto, pages 30-31, *infra*.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 27, 1961. By order of this Court, dated July 25th, 1961, September 22, 1961, was fixed as the date within which to file this petition for a writ of certiorari. The jurisdiction of this Court is invoked under 5 U. S. C. Section 1040.

Question Presented

Where the Board approves an agreement under Section 15 of the Shipping Act of 1916, as amended (39 Stat. 733, 46 U. S. C. Section 814, herein called the "Act"), which purports to authorize the promulgation of rates and charges, rules, regulations and practices governing services and activities, subject to the Act and within the jurisdiction of the Board, and thereafter the parties to the approved agreement publish a tariff which unilaterally fixes rates and charges and imposes rules, regulations and practices for such services and activities, does such a tariff constitute a new agreement or a modification of an existing agreement which requires approval by the Board, under Section 15 of the Shipping Act of 1916, as amended, before it may be lawfully applied and enforced; or assuming that it is not a new agreement or modification of an existing agreement, is the Board required to accept the tariff and permit it to go into effect without prior review or approval?

Statutes Involved

The statutory provision involved is Section 15 of the Shipping Act of 1916, as amended (39 Stat. 733, 46 U. S. C. Section 814), and is set forth in Appendix A, pages 16-17, *infra*.

Statement

Because this case concerns significant economic, as well as legal, issues a brief description of the parties and a summary review of relevant economic and legislative data is submitted as an aid to this Court.

(A) The Parties:

Petitioner Empire is a trade association whose members are motor carriers engaged in the transportation of waterborne freight moving in foreign commerce, from and to piers, docks and waterfront terminals in the Port of New York-New Jersey (herein called the "Port"). Empire's members engage the services of so-called terminal operators, steamship companies and stevedores, namely, the respondents in the proceedings before the Board and intervenors in the Court below (herein called the "Intervenors") for loading or unloading such cargo onto and from their trucks.

(B) The New York-New Jersey Port and Its Economic Role:

The Port is the most important American center of foreign and intercoastal trade. Its waterfront has over 700 miles of shoreline and more than 900 piers, wharves and quays, including 300 deep sea piers. Approximately 125 piers, used for the handling of import and export freight, are operated by the Intervenors.

Substantially all of the cargo which enters or leaves the Port by ship originates at, or is destined to points outside the State of New York, *i.e.*, in other States or foreign countries.

In 1960, 13,736,545 tons of general cargo traffic of the value of $9.7 billion moved over the piers of the Port but,

as the Port of New York Authority noted, the Port's "competitive share of United States general cargo declined * * * *" and there has been a "continuing erosion of its competitive position". *Foreign Trade at The Port of New York 1961*, pp. 5, 21 (published by The Port of New York Authority).

Although official statistics are lacking, it is estimated that 70% of all import and export traffic moves to or from the piers on trucks.

(C) The Waterfront Commission Compact:

Prior to World War I, truckmen dispatched their horse drawn wagons or their motor vehicles to the piers of New York and the employees of the truckmen loaded or unloaded the freight alone or with the aid of casual workers who frequented the piers. As the volume and frequency of import traffic to and from the piers increased, a group of persons known as "public loaders" began to regularly perform the function of loading trucks and later on, with the increase of export tonnage, some public loaders began to unload trucks.

The public loader system generated a number of abuses. As a result of many complaints concerning this system, there were a number of investigations by the Congress of the United States, the City of New York and the State of New York. Following these investigations and in June, 1953, the Legislatures of the State of New York and New Jersey, with subsequent concurrence and approval of the Congress of the United States (67 Stat. 541), enacted a statute known as the "New York-New Jersey Waterfront Commission Compact" (herein called the "Waterfront Commission Act") which, among other things, outlawed and prohibited public loading and the public loader system. McKinney's, "The Consolidated Laws of New York", Volume 65, Section 6700gg.

The Waterfront Commission Act authorized five classes of persons to perform services previously provided by public loaders. Included in the five classes are truckmen and the Intervenors. However, the loading and unloading by individual truckmen proved impracticable for a number of reasons not relevant here. As a result, shortly after the effective date of the Waterfront Commission Act, water carriers in the Port of New York undertook to provide, directly or through independent stevedoring companies in most cases, the services previously performed by public loaders. In practical effect, the Intervenors obtained a monopoly of truck loading at the Port.

On August 24th, 1954, a group of water carriers and stevedores, including Intervenors, entered into an Agreement which purported to authorize the establishment of uniform charges for loading and unloading of oceanborne freight onto and from trucks at piers or other waterfront terminals at the Port. This Agreement, which was filed by the contracting parties with the Board and assigned No. 8005, was approved by the Board on March 23, 1955. A subsequent amendment, designated as Agreement No. 8005-1 was also approved by the Board. The amendment, briefly described, purported to vest exclusive rights over truck unloading in the Intervenors.

(D) The Approved Agreement:

Neither the Agreement (nor the later amendment) contained any rates, charges, rules and regulations, but merely stated that Intervenors "* * * shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices * * *."

Relying upon the Agreement, Intervenors issued Tariffs Nos. 1, 2, 3 and 4 which set forth the rates, charges,

rules and regulations for the loading and unloading services to be rendered by Intervenors.

A challenge to Tariffs Nos. 3 and 4 was rejected, except in minor respects, by the Board on February 24, 1959. Again, purporting to act pursuant to the Agreement, and without obtaining the approval of the Board, the Intervenors issued Tariff No. 5 on January 15, 1960, which became effective February 15, 1960. Petitioner then filed a complaint with the Board charging various violations of the Act. In order to present the basic question involved here, the complaint was amended to allege only that Tariff No. 5 constituted an agreement or a modification of the Agreement within the meaning of Section 15 of the Act and, hence, could not become effective without the prior approval of the Board. Thereupon, the Intervenors filed a motion to dismiss the complaint and Petitioner replied thereto. By order dated May 18, 1960, the Board granted Intervenors' motion and dismissed the amended complaint. Petitioner then filed a petition for review of the order of the Board with the Court of Appeals. Notwithstanding an acknowledgment that Tariff No. 5 was an agreement within the meaning of Section 15 and required prior Board approval, the Court of Appeals affirmed the Board's order.

Reasons for Granting the Writ

1. The question presented is important in the administration of the Shipping Act of 1916, as amended. Directly involved are important and novel issues concerning the meaning and purpose of Section 15 of the Act, the legitimate scope of economic regulation by the Board under the Act and the jurisdiction and powers of the Board thereunder, all of which have not been resolved by this Honorable Court. The relationship between and

among the Board, the persons subject to its jurisdiction and the public are vitally affected by this proceeding.

2. This case involves the important volume of ocean-borne traffic which moves by truck. Since March, 1955, the charges assessed under the tariffs have been increased. It has been charged that the persistent rise in costs of handling oceanborne traffic has diverted foreign trade to ports other than the Port, endangers the investments of thousands of truckmen and the jobs of tens of thousands of trucking employees, impairs the economic stability of the vast multitude of businessmen and workers who depend upon the commerce which moves through the Port for their day-to-day living and for their future security and accounts, in part at least, for the secular decline in the Port's status in world commerce.

3. The Court below has either overlooked or misread the principles enunciated by this Court in *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, et al., 350 U. S. 332 (1956) which involved Section 4 of the Natural Gas Act (52 Stat. 821, 823, 15 U. S. C. 717, 717c).

In that case, this Honorable Court rejected a contention advanced by the Federal Power Commission that rate changes filed by a natural gas company must become effective without a hearing or advance approval by the Commission; that consistent administrative practice by the Commission required the acceptance of the filed charges; and that the sole remedy of an aggrieved party was to pay the new rate, and to await the outcome of a subsequent hearing as to the reasonableness of the increase (unless, of course, the new rate was suspended during the pendency of the hearing).

The lesson of *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, *supra*, should have been the touchstone of the decision in the case at bar. Here the Intervenors filed an Agreement which set forth no rates, charges, rules or regulations but which provided that the Intervenors would "establish, publish and maintain tariffs containing just and reasonable rates, changes, classifications, rules, regulations and practices with respect to" the services of loading and unloading trucks and that "all published tariffs of rates, charges, classifications, and all rules and regulations covering their application, and additions thereto and all changes therein, applicable to loading or unloading * * * shall be promptly furnished to" the Board. The Intervenors then proceeded to publish tariffs which not only constructed a comprehensive scheme of rates, charges, rules, regulations and practices, not incorporated in the approved Agreement, but accomplished numerous changes, including increases in rates and charges. The Board determined that it had no power to suspend, approve or disapprove the tariffs and, hence, the tariffs had to be permitted to go into effect without Board action. The Board and the Court below held, in substance, that the sole remedy was a subsequent proceeding under Section 17 and, possibly Section 22 of the Act (App. B, p. 25).

In *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, *supra*, a natural gas company proceeded to unilaterally alter the rates established by agreement with a distributor. The Federal Power Commission disclaimed power or authority to reject the new contract rates and, like the Board in this case, referred to other sections of the Natural Gas Act as sources for relief against new rates. Simply stated, then, the Board, in the case at bar, and the Federal Power Commission, in *United Gas Pipe Line Company* v. *Mobile Gas Service Cor-*

poration, supra, held that all that was required under the statute was a filing of the new rates, whereupon they become effective automatically. This is plainly erroneous:

> "In short, the Act provides no 'procedure' either for making or changing rates; it provides only for notice to the Commission of the rates established by natural gas companies and for review by the Commission of those rates."
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> • • • • •
>
> "• • • there is nothing in the structure or purpose of the Act from which we can infer the right, not otherwise possessed and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts" (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation, supra*, pp. 343 344).

In short, the fact that the Federal Power Commission could exercise its powers under Section 5(a) of the Natural Gas Act to set aside or modify a rate which it found "unjust, unreasonable, unduly discriminatory, or preferential" did not mean that unilateral contract changes must be permitted to go into effect and that the Federal Power Commission could not reject or suspend the new contract rates. Precisely the same error was committed by the Court below in this case when it relied upon Sections 17 and 15 of the Shipping Act (which permits the withdrawal of approval of an agreement if a rate is found unreasonably high) (App. B, p. 25), as a basis for holding that unilateral rate changes effected by new tariffs must become effective without prior Board approval. Assuming, *arguendo*, that a new tariff is not an agreement but an integral part of the basic approved agreement, then changes in the tariff constitute, at the very least, changes in the terms of the approved Agreement and these uni

lateral contract rate changes can no more become automatically effective than a change in a contract rate for natural gas supplied to distributors. Indeed, in *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 143 (1937), this Court said:

> "the act requires that if any contract for a change of those rates is made, the new rates may be charged only after the Board has approved the agreement."

4. The decision by the Court below is in conflict with the decision of another panel of that Court which decided *Isbrandtsen Co.* v. *United States*, 93 App. D. C. 293, 211 F. 2d 51 (1954), cert. den. sub nom. *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U. S. 990, 74 S. Ct. 852 (1954) (hereinafter called the "*Isbrandtsen case*").

Petitioner's contentions, are essentially, two-fold: first, even if a basic conference agreement authorizes the establishment of rates and charges, the promulgation of a complete tariff, setting forth the actual rates, charges, rules and regulations constitutes a new agreement or a modification of an existing agreement and, therefore requires prior Board approval. This is not a "routine" matter which the Board has held does not require prior approval.

Precisely the same question was presented in the *Isbrandtsen case* where the basic conference agreement authorized the establishment of dual rates but did not set forth the actual rates. The Court of Appeals held that the establishment of the dual rates was not an "interstitial sort of adjustment" but was either a new agreement or a modification of an existing agreement which required prior Board approval. The Court then rejected the Board's argument (identical with the one advanced in

the instant case) that publication of dual rates was routine and had always been so considered by the Board. The mere fact that dual rates were authorized by the basic agreement did not constitute a protective umbrella for any and all dual rates thereafter published. On the contrary, all such rates did require the approval of the Board.

Agreement 8005 which the Board originally approved provided that the contracting parties would, in the future, "establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices."

This Agreement, like the one in the *Ishmaltsen case*, does not contain the actual rates and charges for this service nor does it set forth any of the rules, regulations and practices. In effect, therefore, it is merely an agreement among the Intervenors to publish and observe uniform rates, charges, practices and rules to be established in the future and to file all such tariffs with the Board. An examination of Tariff No. 5, which Intervenors published, shows that it not only sets forth an extensive and complex schedule of rates and charges, but defines the nature of the Intervenors' obligations, adopts rules with respect to their liability, describes the conditions under which other persons might load and unload trucks and generally sets forth the manner and method by which trucks will be loaded or unloaded or service refused. If the *Ishmaltsen case* means anything, it teaches that such a tariff must be approved by the Board before it becomes effective, because it is a new agreement or a modification of the basic Agreement.

The Shipping Act does not provide a procedure for establishing or changing loading or unloading rates. But this does not prove, as the Court below found, that publishing comprehensive tariffs and making subsequent

changes in rates, charges and practices could be automatically accomplished (*United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, *supra*).

5. The Court below acknowledged that Tariff No. 5 did constitute an agreement within the meaning of Section 15. However, departing from the decision in the *Isbrandtsen case*, the Court turned to questionable doctrines of statutory construction to overcome the plain meaning and purpose of the statute. Section 15, by its very terms, makes clear that the Intervenors could not have been authorized to publish tariffs which became automatically effective as "routine" matters. Thus, Section 15, *inter alia*, requires the filing of "every agreement * * * fixing or regulating transportation rates or fares". If by liberal construction, the tariffs be deemed to prescribe "transportation rates" then, obviously, the approved Agreement did no such thing. If the Agreement provides for a "cooperative working arrangement", which it concededly does, it describes only a method for formulating rates and charges and requires filing. But mere filing does not connote automatic approval. The fact is that Section 15 of the Act does not contemplate the approval of agreements which confer a right upon private parties to fix rates, charges and practices in the future by unilateral and self-executing action. To put it simply, if the Intervenors had filed a tariff instead of the Agreement this would have been an "agreement" as defined by the Act. If the tariff was then modified or altered or portions cancelled, Section 15 would clearly require Board action. Assuming then that the basic Agreement was filed together with the first tariff and the basic Agreement and first tariff were deemed to be the "Agreement," then, clearly, Tariff 5 being a new schedule of rates and charges would be a modification which required prior Board approval.

These conclusions are compelled by the language of Section 15 of the Act and the logic of the entire statute.

This Court has consistently defined the judicial function to be the enforcement of a statute according to its terms and to be guided by its plain meaning. *Jay* v. *Boyd*, 351 U. S. 345 (1956). In the complex field of statutory construction, there is no canon more reliable than the one which instructs that when the language is clear and unambiguous, it means what it plainly says. *Ex-Parte Collett*, 337 U. S. 55 (1949). In the instant case, when the Court below held that Tariff No. 5 was an agreement, further construction was mere sciamachy.

The rationale for the decision below was equally untenable. The Court was apprehensive that a requirement for Board approval could make the "present statute unworkable" and "approval would require notice to interested parties and a hearing with substantial and often protracted delays * * *" (Appendix B, p. 25). This, however, was palpably wrong. Petitioner did not suggest the need for extended hearings preliminary to the approval of each tariff. It is elementary that rate-making is rule-making under Section 2(c) of the Administrative Procedure Act (5 U. S. C. 1001 (c)) and which does not require a hearing (in the absence of an express requirement for a hearing in the governing statute).

Notice of filing is required, but the Board could approve without a hearing and such a procedure would not be "merely formal" and become "of little significance" (App. B, p. 25). Section 15 prescribes legislative standards for approval and the Board could, in the case of tariffs such as Tariff No. 5, as it did with conference agreements, promulgate rules, regulations and requirements which would implement the statutory mandate (cf. 46 C. F. R. 236).

The Board cannot abdicate its power to approve or disapprove an agreement to private parties and approval cannot be merely formal. Indeed, if Section 17 (barring illusory reparation proceedings under Section 22 of the Act) provide the sole remedies available to private parties, rates and practices can be established which would destroy commerce until the Board elected to act. No such intent is discernible in the statute or the legislative history.

Statutes which grant immunity from anti-trust laws must be strictly construed and the superintendence of the agency administering the exculpatory Act must be encouraged (*United States* v. *Borden Co.*, 308 U. S. 188 (1939)). The Intervenors who have an actual monopoly of truck loading and unloading at the piers, are not only granted immunity from the anti-trust laws by the Section 15 approval of their agreement, but the Board and the Court below now hold that this limited immunity sanctions price-fixing at any time, at any levels, with or without justification.

Reliance by the Board and the Court below on the so-called legislative history was misplaced. It is true that the Board has repeatedly held in cases, similar to the one at bar, that the issuance of a tariff is a routine matter. But the same argument was advanced by the Board when dual rates were established pursuant to a conference agreement authorizing the same. Despite the Board's long administrative practice, to the contrary notwithstanding, the Court of Appeals in the *Isbrandtsen case* held that the promulgation of dual rates required prior Board approval.

This Court, in *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U. S. 481 (1958) held that the Board departed from the plain meaning of Section 15. Indeed, in the brief filed with this Court by the Board in that case, so-called legislative history was relied upon to sustain an

administrative practice and construction of ancient vintage which this Court rejected.

At a hearing before the *Antitrust Subcommittee of The Committee on the Judiciary House of Representatives* (86th Cong., 1st Sess., Part I, Volume I, page 175), and a hearing before the *Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries House of Representatives* (86th Cong., 1st Sess., Part 3, page 1803), former Chairman Morse of the Board acknowledged that clarifying legislation was needed so that even so-called routine matters would not require approval under Section 15.

In short, the legislative history is not so clear, compelling and exigent as to justify disregard for the plain meaning of Section 15. The construction by the Board given to Section 15 is entitled to no weight since it is clearly contrary to the express language of the statute and except for the decision below, to other and better judicial precedents (*Isbrandtsen case; Pennsylvania Motor Truck Association, et al. v. Port of Philadelphia Marine Terminal Association, et al.*, 183 F. Supp. 910 (D. C. E. D., Pa. 1960)).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: September 21, 1961.

Respectfully submitted.

HERBERT BURSTEIN,
Counsel for Petitioner.

Appendix A

Section 15 of the Shipping Act, as amended, (46 U. S. C. Section 814):

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.
>
> "The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this

chapter, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

"All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification or cancellation lawful under this section shall be excepted from the provisions of section 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15840

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., PETITIONER

v.

FEDERAL MARITIME BOARD AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN EXPORT LINES, ET AL., INTERVENORS

On Petition for Review of an Order of the Federal Maritime Board

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Decided April 27, 1961

Mr. Herbert Burstein, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. John A. Kendrick* was on the brief, for petitioner.

Mr. Frank Gormley, Attorney, Federal Maritime Board, of the bar of the United States District Court for the District of Columbia, *pro hac vice*, by special leave of

court, with whom *Messrs. James L. Pimper*, General Counsel, Federal Maritime Board, *Robert E. Mitchell*, Assistant General Counsel, Division of Litigations, Federal Maritime Board, *Edward Aptaker*, Assistant General Counsel, Division of Regulations, Federal Maritime Board, and *Richard A. Solomon*, Attorney, Department of Justice, were on the brief for respondents.

Mr. Mark P. Schlefer, with whom *Mr. T. S. L. Perlman* was on the brief, for intervenors.

Before FAHY, DANAHER and BASTIAN, *Circuit Judges*.

FAHY, *Circuit Judge*: Petitioner is an association of motor carriers engaged in the transportation of freight moving in foreign commerce from and to piers, docks and waterfront terminals in the Port of Greater New York. The carriers engage the services of various terminal operators, steamship companies and stevedores. These include the intervenors, who operate ocean terminal facilities in the Port. They load or unload the cargo carried by the trucks of the motor carriers and destined for export or being imported by water.

Intervenors have formed a "conference" which is authorized to function under an agreement, referred to as the basic or conference agreement. This agreement is identified as FMB Agreement No. 8005, and was approved by the respondent Board March 23, 1955, under section 15 of the Shipping Act of 1916, set forth in the margin.[1] It

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[1] § 15, 39 Stat. 733 (1916) as amended, 46 U.S.C. § 814 (1958) provides:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other persons subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in

is seen from the terms of section 15 that action taken in concert by members of a conference under an approved section 15 agreement is immunized from the operation of

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part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board, shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

the antitrust laws, but that it is unlawful to carry out in whole or in part, directly or indirectly, any agreement, modification or cancellation thereof prior to approval by the Board.

The conference agreement grants the following authority to the parties to it:

> 1. That they shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such services—the first such tariff to be established by the unanimous agreement of the parties hereto. The approval of not less than two-thirds of the parties represented at a meeting shall be required for any change, in addition to or deletion from said tariffs, issued as supplements thereto or as re-issues thereof.
>
> 2. That they shall assess and collect rates and charges for and in connection with such services strictly in accordance with rates, charges, classifications, rules, regulations and practices set forth in said tariffs and, further, shall not in any respect whatsoever deviate from or violate any of the terms or conditions or provisions of said tariffs, and no rates or charges assessed or collected pursuant to such tariffs shall be directly or indirectly refunded or remitted in whole or in part in any manner or by any device.

On January 15, 1959, the conference filed Tariff No. 5 with the Board, increasing the rates charged by its members to the members of petitioner some 15 per cent, effective February 15, 1960. The tariff also contains certain changes in regulations and practices affecting the business

done by intervenors with petitioner's members.[2] The tariff was filed with the Board but was put into effect without Board approval. Intervenors considered the tariff not to be a section 15 agreement or modification which required approval in addition to the approval previously given the basic agreement itself.

Petitioner filed a complaint with the Board challenging the validity of Tariff No. 5 because of the absence of specific Board approval. On motion of intervenors, respondents before the Board, the complaint was dismissed, the order reciting,

> The Board and its predecessors consistently have held that the issuance and modification of tariffs pursuant to an approved basic agreement are not new agreements, or modifications of agreements, requiring prior section 15 approval. See *Empire State H'W'Y Transp. Ass'n.* v. *American Export Lines*, 5 F.M.B. 565, 585, 586 (1959).[3]

Petitioner here seeks review of this order of the Board, the question being whether Tariff No. 5 requires Board approval under section 15.

In a literal sense the tariff is an agreement as to rates reached in concert by members of the conference. Section 15 in terms requires approval, in order to be lawful, of every agreement "fixing or regulating transportation rates or fares"; and we take it that the fixing and regulation of charges for services furnished by intervenors to members of petitioner are "transportation rates or fares."

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[2] We do not separately consider the regulations and practices, for if, as we hold, the rate increase is valid the same reasoning carries with it the validity of these particular regulations and practices.

[3] *Empire State Highway Transp. Ass'n* v. *American Export Lines, Inc.*, No. 894, FMB, May 18, 1960.

Nevertheless, the problem is not solved by a literal reading of some of the language of section 15. It must be solved by considering this language with other provisions of the statute in the light of a long legislative and administrative history.

Since 1927 the Board[4] has construed the expression "every agreement" in section 15 as not to include "routine operations relating to current rate changes and other day-to-day transactions." *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). And "routine operations" has consistently been interpreted by the Board to include conventional rate changes. In 1959 in the proceedings of *Empire State Highway Transp. Ass'n* v. *American Export Lines, Inc.*, 5 F.M.B. 565 (1959), involving intervenors' earlier Tariffs Nos. 3 and 4, the Board said, at page 585:

> We agree with the examiner and find that the tariffs are not modifications of the basic agreement or new agreements, within the meaning of section 15. The issuance of tariffs, including rates, charges, rules, and regulations covering the application of the tariffs, were authorized and contemplated by the approved basic agreement.
>
> The Board and its predecessors have uniformly held since *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927), that the issuance of tariffs, including rules and regulations covering their application, have been routine matters authorized by an approved basic conference agreement, not requiring separate approval under section 15.

We think this is a reasonable construction of the terms of the basic agreement which authorize the conference to

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[4] We use the word "Board" as including also the Board's predecessors.

"establish * * * tariffs containing just and reasonable rates * * * regulations and practices."[5]

Thousands of rate changes have been agreed upon in concert by conference members in the maritime and related industries under the authority of approved conference agreements, and we are cited to no instance in which conventional rate changes have been held by Board or court to be unlawful because unaccompanied by prior Board approval. This long administrative practice is unusually impressive; and we do not believe that the Supreme Court intended to change its course by the statement in *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 146 (1937), in passing upon a different question, that "the act requires that if any contract for a change of those rates is made the new rates may be charged only after the board has approved the agreement." We think this reference to the language in section 15 was not intended as a construction of the provision in its application to such a case as the present, though our own case of *Isbrandtsen Co.* v. *United States*, 93 U.S. App. D.C. 293, 211 F. 2d 51, *cert. denied*, 347 U.S. 990, demonstrates that a conference agreement is not a canopy under which to inaugurate without prior Board approval a dual contract system of charges or rates. As the Board argues, "A tariff change and modification of the basic agreement may sometimes be a matter of degree."

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[5] Petitioner does not challenge the reasonableness or propriety of the rates and regulations contained in Tariff No. 5 itself, only their lawfulness as not having been approved under section 15 as a subject agreement or modification of an agreement.

It is to be remembered also that the rates are subject to Section 17 of the Shipping Act requiring the observance of just and reasonable regulations and practices and, additionally, that when a conference has engaged in conduct violative of the fair and reasonable standards of the Act the Board may withdraw approval of the basic agreement itself, or require its modification.[7]

We would require clearer expression of its purpose to attribute to Congress, in light of the history of this problem, an intention to require every rate increase made through the procedures of an approved basic agreement to be approved by the Board in advance of effectiveness. This would make the present tariffs unworkable, unless approval were to be merely formal; for unless merely formal, the process of litigation, approval would require notice to interested parties and a hearing with [illegible] and other protracted delays incident to administrative decision and judicial review. We know of no [illegible] that Congress intended a result so departure from

Moreover, when we consider the manner in which Congress has approached the problems of domestic water traffic under the Act, compared with the provisions applicable to intervenors, the view we adopt gains further support. Domestic carriers are required to adhere to filed rates and to give thirty days notice of changes; and the Board may suspend rates for not to exceed four months and fix maximum rates.[9] These provisions came into effect in 1933 when Congress was aware of the administrative interpretation under which foreign rates established under conference agreements were not required to have section 15 approval. See H.R. Rep. No. 2006, 72d Cong. 2d Sess. 4 (1933). To interpret section 15 to require such approval for foreign rates would attribute to Congress an intention to exercise more stringent controls over foreign than over domestic rates; for such an interpretation would mean indefinite suspension of foreign rate changes.[10] Yet nothing indicates Congress intended rate changes for foreign traffic to be more difficult than changes applicable to domestic trade. And the terminal operators whose rates are here questioned by petitioner are under the same regulations

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of time, at the expiration of which the rates become effective whether or not approved. Rates which become effective in such manner, however, may be the subject of re-calculation or disapproval upon the later termination of hearings to determine the lawfulness of such rates. See, e.g., Inter-state Commerce Act §§ 6, 15(7), 24 Stat. 380 (1887), 44 Stat. 1447 (1927), as amended, 49 U.S.C. §§ 6(1), 6(3), 15(7) (1958); Motor Carrier Act §§ 216(a), (g), 217(c) (1935), as amended, 49 U.S.C. §§ 316(a), (g), 317(c) (1958); Natural Gas Act § 4, 52 Stat. 822 (1938), 15 U.S.C. § 717c (1958); Federal Aviation Act §§ 403(a), (c), 1002(g), 72 Stat. 758-59, 799, 49 U.S.C. §§ 1373 (a), (c), 1482(g) (1960).

[9] Intercoastal Shipping Act § 2, 47 Stat. 1425 (1933), 46 U.S.C. § 844 (1958).

[10] The established practice of filing rate tariffs agreed to under conference procedures, for information, is not to be confused with filing for prior approval.

insofar as rates are concerned as are those engaged in foreign trade.

Approval of an administrative interpretation is not lightly to be laid at the door of Congress; but the evidence of awareness by Congress of the Board's interpretation over a very considerable period, during which Congress considered the legislation several times with no change in section 15 as administratively interpreted cannot be altogether ignored.[11] When the Shipping Act was before the House Committee of the Merchant Marine and Fisheries the distinction between the method by which rates were regulated under the Interstate Commerce Act and the method proposed in the Shipping Act was pointed out by one of the draftsmen of the latter, who stated that the carriers would work out their own rates without being obliged to file them with the Government unless they were joint interline rates of two connecting carriers.[12] The distinction between this and the provisions of the Interstate Commerce Act was adverted to.[13] And the testimony indicates that the distinction held as to conference rates as well as to those of an individual carrier.

The long practice of the Board, beginning no later than 1927, of permitting tariffs to be filed for information and to become effective without approval has been set forth in reports to Congress, including the report of *Section 15 Inquiry, supra*, preceding the enactment of the Merchant

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[11] *See Service* v. *Dulles*, 354 U.S. 363, 380; *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549-50; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366; *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 313.

[12] Hearings on Regulatory Features of Shipping Bill Before the House Committee on the Merchant Marine and Fisheries, 64th Cong. 1st Sess. 17 (1916) (testimony of Dr. Emory R. Johnson)

[13] Id. at 35.

Marine Act of 1928.[14] Moreover, the *Section 19 Investigation* of 1935, 1 U.S.S.B.B. 470, was brought to the attention of Congress in the Board's annual report for 1935 and 1936[15] when Congress was revising the Shipping Act of 1916 and transforming it into the Merchant Marine Act of 1936.[16] Finally, in the wake of *Isbrandtsen Co. v. United States*, 356 U.S. 481 (1958), Congress moved to preserve the status quo as far as dual rate arrangements affected by that decision were concerned.[17] In 1959 the Board again reported its practice with respect to tariffs filed pursuant to section 15 agreements. The Chairman of the Board testified:

> The regulation of water carriers in the foreign trade of the United States is substantially different from the regulation of carriers in our domestic trades. The Board has been given no direct control over the reasonableness of rates in the foreign trade. It may not prescribe either maximum or minimum rates in these trades; in fact, it has little to say as to the measure of the rates of common carriers by water serving our foreign trade. There is no requirement for the advance filing of freight rates in the foreign trade, nor any authority to suspend these rates. However, by its General Order 83, the Board requires common carriers by water in the foreign trade to file their export rates within a period of 30 days after they have become effective and it requires a similar filing of all rates established by common carriers by water pursuant

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[14] 45 Stat. 690 (1928), 46 U.S.C. § 891 (1958).

[15] Report of the United States Maritime Commission 16 (1936).

[16] 49 Stat. 1985 (1936), 46 U.S.C. § 1101 (1958).

[17] Act of June 29, 1960, P.L. 86-542, 74 Stat. 253; Act of August 12, 1958, P.L. 85-626, 72 Stat. 574.

> to any agreement subject to the Board's jurisdiction. . . .
>
> There are 125 steamship conferences covering the various freight trades of the United States. The minutes and records of their meetings, and their rates and practices, are filed with the Board and are examined so far as staff limitations permit to ascertain whether actions taken are within the authority of their approved agreements and are not contrary to provisions of law or decisions of the Board or the courts.[18]

A description by the Board of its section 15 practices was also given to the House Antitrust Subcommittee in 1959. The Board then recommended that "All conferences and nonconference [sic] berth services should be required to file their rates with the Federal Maritime Board 90 days in advance of their effective date," and that the rates duly filed should be the only rates charged.[19] This recommendation has not been enacted into law. The extension by Congress of the "status quo" legislation above referred to was on the background of this information that currently there was no requirement that conference rates receive section 15 approval before becoming effective. If a different position is now to be adopted we think it should be at the hands of Congress rather than required by the courts.

Affirmed

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[18] Hearings Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries, 86th Cong., 1st Sess. 3-4 (1959).

[19] Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess. 172-173 (1959).

ORDER

At a Session of the Federal Maritime Board, held at its office in Washington, D. C. on the 18th day of May, A. D. 1960.

DOCKET NO. 894

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC. and NEW JERSEY MOTOR TRUCK ASSOCIATION, INC.,

v.

AMERICAN EXPORT LINES, INC., *et al.*

On January 15, 1960, respondents, pursuant to approved agreement 8005, issued and filed with the Board Tariff No. 5 to become effective February 15, 1960.

By amended complaint dated March 2, 1960, complainants allege that Tariff No. 5 is a new agreement, or modification of an agreement, unapproved under Section 15 of the Shipping Act, 1916, and request that the Board suspend the operation of the tariff and require respondents to submit the tariff for approval as a section 15 agreement.

On March 22, 1960, respondents filed a motion to dismiss the complaint on the grounds, among others, that the complaint fails to state a cause of action upon which relief can be granted. Respondents filed a reply to the motion dated March 31, 1960.

The Board and its predecessors consistently have held that the issuance and modification of tariffs pursuant to an approved basic agreement are not new agreements, or

modifications of agreements, requiring prior section 15 approval. See *Empire State HWY Transpn. Ass'n. v. American Export Lines*, 5 F.M.B. 565, 585, 586 (1959).

It is ORDERED, that the amended complaint herein be, and it is hereby, dismissed.

By the Board.

s s JAMES L. PIMPER
Secretary

(SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 432

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 18–29) is reported at 291 F. 2d 336. The order of the Federal Maritime Board[1] (Pet. App. 30–31) has not been officially reported.

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[1] On August 12, 1961, pursuant to Reorganization Plan No. 7 (H. Doc. 187, 87th Cong., 1st Sess.), the Federal Maritime Commission succeeded to the regulatory functions of the Federal Maritime Board. The Federal Maritime Commission and its predecessors are hereinafter referred to as the "Commission."

JURISDICTION

The court of appeals entered its judgment on April 27, 1961 (Pet. App. 18). By order of Mr. Justice Black, dated July 25, 1961, the time for filing a petition for a writ of certiorari was extended to September 22, 1961, and the petition was filed on that date. The jurisdiction of this Court is invoked under 5 U.S.C. 1040 and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed an order of the Commission holding that a tariff filed pursuant to a basic agreement approved by the Commission under Section 15 of the Shipping Act of 1916 does not require prior approval by the Commission in order for the rates, and explanatory rules and practices embodied therein, to become lawfully effective.

STATUTES INVOLVED

Section 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 814, is set out in Appendix A of the petition (pp. 16–17). The pertinent provisions of Public Law 87–346, 75 Stat. 763, 764, enacted October 3, 1961, read as follows:

> * * * tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

STATEMENT

The petitioner, Empire State Highway Transportation Association, Inc., is composed of motor carriers engaged in the transportation of freight which has been imported or is destined for export through the Port of Greater New York. The intervenors below operate terminal facilities at the Port and load or unload the freight carried by petitioner's members. Intervenors have formed a conference and the Commission, pursuant to Section 15 of the Shipping Act of 1916, has approved the basic conference agreement (FMB agreement No. 8005), which authorizes the members to "establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices" (Pet. 21).

On January 15, 1960, the conference filed Tariff No. 5 pursuant to the approved conference agreement, increasing the rates charged by more than 15 percent.[2] The new rates were to become effective on February 15, 1960, and were in fact put into effect on that date without having been approved by the Commission (Pet. 21–22). Petitioner filed a complaint with the Commission on February 16, 1960, charging various violations of the Shipping Act of 1916, but later amended the complaint and limited the charge to an allegation that the filed tariff constituted an agreement or a modification of the basic conference agreement within the meaning of Section 15 of the Act and thus could not lawfully become effective without prior Commission approval. The Commission granted the

[2] The tariff also made three minor changes in the explanatory rules accompanying the various rates schedules.

intervenors' motion to dismiss the amended complaint and entered an order stating that "[it has been] consistently * * * held [by the Commission] that the issuance and modification of tariffs pursuant to an approved basic agreement are not new agreements, or modifications of agreements, requiring prior Section 15 approval" (Pet. 30–31).

On appeal, the court below affirmed, holding that while "[i]n a literal sense the tariff is an agreement as to rates" within the meaning of Section 15, "the problem is not solved" by such a literal reading and that this language must instead be considered along "with other provisions of the statute in the light of a long legislative and administrative history" (Pet. 22–23). The court found significant the Commission's "unusually impressive" and "long administrative practice" of holding conventional rate changes lawful even though they are "unaccompanied by prior [Commission] approval" (Pet. 24). The court also stressed the "awareness by Congress of the [Commission's] interpretation over a very considerable period, during which Congress considered the [Act] several times with no change in section 15 as administratively interpreted" (Pet. 27). Finding that petitioner's contention "would make the present statute unworkable" (Pet. 25) and, in effect, impose "more stringent controls" over rates in foreign commerce than Congress has legislated for the more heavily-regulated domestic water traffic (Pet. 26), the court concluded that "[i]f a different position is now to be adopted * * * it should be at the hands of Congress" (Pet. 29).

ARGUMENT

The petition presents no important question of law warranting review by this Court. On the contrary, the question involved is of no general interest since the contested Commission practice has now been specifically affirmed by amendment to the governing statute.

1. An amendment to Section 15 of the Shipping Act, enacted October 3, 1961, provides that "tariff rates * * * shall be permitted to take effect without prior approval," thereby directly confirming the previous Commission practice. Public Law 87-346, 75 Stat. 764. This statute effectively disposes of whatever future importance the decision below might otherwise have had and limits its import to the particular case. So considered the decision raises no question warranting further review by this Court.

2. The decision below is in any event correct. This Court has recognized that the interpretation of a statute administered by an agency is in the first instance a question for that agency and that a long-established construction and interpretation is entitled to great weight. *United States* v. *Eaton,* 169 U.S. 331, 343; *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 130-131.

The Commission's practice in respect to rate changes has been settled for over 30 years. Since 1927, the expression "every agreement" in Section 15 has been defined so as to exclude therefrom "routine operations relating to current rate changes." *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, 125. And this position had been reaffirmed with respect to the

basic agreement involved in this case in *Empire State Highway Transportation Ass'n* v. *American Export Lines*, 5 F.M.B. 565. This long-standing interpretation by the Commission acquired greater significance since, as the court of appeals noted (Pet. 27), it had been directly brought to the attention of Congress on several occasions when related legislative questions were under consideration, and Congress never saw fit to make any changes in Section 15 which would alter the practice.[5]

3. Petitioner asserts that the court of appeals "has either overlooked or misread the principles enunciated by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., etc.*, 350 U.S. 332" (Pet. 7). In that case it was held that the Natural Gas Act, 15 U.S.C. 717 *et seq.*, did not authorize a regulated natural gas company furnishing gas under contract with a distributing company unilaterally to change the rate specified in the contract by filing a new schedule with the Federal Power Commission. But the issue involved in that case was solely one of the power of a natural gas company, without the consent of the other contracting party, to change the rates to which it had bound itself by contract, a question in no wise involved

[5] The court of appeals also noted that the theory advanced by petitioner "would make the present statute unworkable" (Pet. 25). "A total of 32,503 rate filings covering freight and passengers was received [by the Federal Maritime Commission] during the [fiscal] year" ending June 30, 1960. Annual Report of the Federal Maritime Board and Maritime Administration, p. 36 (1960). Since Section 15 makes it unlawful to carry out any agreement before Commission approval, none of these rates could have, in petitioner's view, become operative before administrative review.

here. It was undisputed in that case that, if the other contracting party had agreed to the change (or if the rate had not been fixed by contract), the change would have become effective without prior Commission approval. It is only that question, undisputed in *Mobile*, that is involved here—whether prior Commission approval is required to make effective a rate that would otherwise have been valid as between the parties—and petitioner's entire argument is based on a provision of the Shipping Act (Section 15) totally unlike anything in the Natural Gas Act.

Petitioner's allegation of conflict between the instant case and the decision of the same court of appeals in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, is likewise without merit. *Isbrandtsen* involved the inauguration of a new system of dual-rate contracts calling for exclusive patronage by contracting shippers, and was not concerned with a simple change in rate levels. It offers no support for the view that every conventional rate change must have prior Commission approval in order to be lawful; in fact, the court of appeals expressly noted in *Isbrandtsen* that the inauguration of the dual-rate system there involved was not an "interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement." 211 F. 2d at 56.

CONCLUSION

The decision below is correct and no grounds warranting further review are presented.

Respectfully submitted.

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OCTOBER 1961.

U. S. GOVERNMENT PRINTING OFFICE: 1961

Office Supreme Court, U.S.
FILED
NOV 10 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 432

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v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

AMERICAN EXPORT LINES, *et al.*,

Intervenors.

PETITIONER'S REPLY

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Intervenors.

PETITIONER'S REPLY

Petitioner respectfully submits this reply, as permitted by Rule 24(4) of the Revised Rules of the Supreme Court of the United States, to the briefs filed by the Respondents and Intervenors.

POINT I

This case has not been rendered moot or unimportant by reason of the October 3, 1961, amendment to Section 15.

This appeal was not rendered moot by Congressional action. Respondents and Intervenors have incorrectly described the scope and meaning of the recently enacted Section 2 of Public Law 87-346 (75 Stat. 764) which

amended Section 15 of the Shipping Act, 1916, as amended (46 U. S. C. Section 814). Section 2 is inapplicable because this case involves "other persons" subject to the Shipping Act as amended (herein called the "Act") and not water carriers. The issue to be resolved is the legality of charges for accessorial (non-transportation) services which Section 2 does not reach or purport to govern, and not transportation rates which are subject to Section 2.

The text of the Public Law 87-346 and the Committee Reports (H. Rept. No. 498, August 31, 1961; S. Rept. No. 860, August 31, 1961; Conf. Rept. No. 1247, September 20, 1961) shows, of course, that Congress intended only to amend the Act insofar as it applied to the transportation activities of carriers, conferences of carriers and dual rate agreements. In a real sense, the new law is a legislative response to *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U. S. 481 (1958). Since the activities challenged by Petitioner do not relate to or affect carriers or dual rates or conferences which establish transportation rates, Section 2 does not render this appeal moot.

The provision of Section 2 relied upon by Respondents and Intervenors, namely that " * * * tariff rates, fares and charges * * * shall be permitted to take effect without prior approval" is submitted out of context and ignores the legislative history of Public Law 87-346, 75 Stat. 764.

The tariff rates referred to in Section 2 are, obviously, those published by common carriers by water which provide transportation services. This is made clear by the fact that prior approval of tariff rates is not required if the water carrier has complied with the newly adopted Section 18(b) of the Act (Public Law 87-346, Section 4). Quite clearly, Section 18(b) is applicable only to common carriers by water; no reference whatever is made to the activities of "other persons" such as Intervenors who do

not act as water carriers when they engage in truck loading and unloading activities but who are, nevertheless, permitted to operate under Section 15 agreements and are accorded exemption from the anti-trust laws. Public Law 87-346 was neither designed to, nor does not, reduce the area of regulation. On the contrary, the new law expanded the ambit of the Act to cover activities which the Federal Maritime Board previously claimed were not regulated [*Federal Maritime Board* v. *Isbrandtsen Company*, 356 U. S. 481 (1958)].

What Respondents and Intervenors fail to recognize is that "Tariff" No. 5 is a new agreement or a modification of Agreement No. 8005 which required prior Board approval. "Tariff" No. 5 is not a true tariff within the meaning of that term as employed in the Act. Merely calling a document a "tariff" does not create immunity from the requirement of prior agency approval prescribed by Section 15 of the Act. In short, "Tariff" No. 5, despite its label, was not a conventional tariff published by carriers but a new agreement, pure and simple or, at least, a modification of an existing agreement, which, in either case, required prior approval.

If Intervenors are not subject to the same restrictions as carriers by water, e.g., *Section 18(b)* of the new law, then their activities must be subject to prior approval especially since they are accorded exemption from the anti-trust laws. The Act must be strictly construed. Public policy considerations, both domestic and foreign, implicit in the regulation of water carriers which may dictate that carriers be permitted to change transportation rates without prior approval, are absent here. The activities of Intervenors are limited to exclusively the Port of New York and they are not dependent, in any way, upon the policies of foreign governments or foreign na-

tionals, and public policy does not suggest that prior approval, in the facts and circumstances of this case, be waived.

POINT II

The prior legislative history of Section 15 does not now support Respondents' and Intervenors' contentions.

A review of the Congressional reports which accompanied Public Law 87-346, shows that Congress did not accept the Board's long standing but incorrect conclusion that prior approval was not required for a new agreement such as Tariff No. 5. On the contrary, the extensive modifications of Section 15 supports the Petitioner's contention that Congress rejected the Board's earlier consistent but erroneous construction of the statute. Where prior approval is not required, Congress has inserted additional limitations and safeguards. No such safeguard exists in the instance of an agreement such as Tariff No. 5.

The Court of Appeals for the District of Columbia, having determined that "Tariff" No. 5 is an agreement, improperly relied upon canons of construction to avoid the injunction of Section 15 that prior approval is required before the "Tariff" could become effective.

POINT III

There Is a Conflict of Decisions

The petition for a writ of certiorari (pp. 7-14) shows the conflict between the decision of the Court below and *United States Pipe Line Company* v. *Mobile Gas Service*

Corporation, etc., 350 U. S. 332 (1956) and *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (1954), cert. den. sub nom. *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U. S. 990 (1954). Moreover, the Court below failed to note that there is a procedure to be followed (as set forth in the *United* case) whereby prior approval could have been required for Tariff No. 5, without rendering Section 15 unworkable. In any event, neither Respondents nor Intervenors can or did reconcile the decision of the Court below with the teaching of *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 143 (1937):

> "the act requires that if any contract for a change of those rates is made, the new rates may be charged only after the Board has approved the agreement."

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 9, 1961.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
OCT [illegible] 1961
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Office-Supreme Court, U.S.
FILED
DEC 4 1961
JOHN F. DAVIS, CLERK

No. 432

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR INTERVENORS IN OPPOSITION

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October 20, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

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v.

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BRIEF FOR INTERVENORS IN OPPOSITION[1]

OPINIONS BELOW

The order of the Federal Maritime Board and the unanimous opinion below are set forth in Appendix B to the petition (pp. 18-31).

[1] This brief is filed on behalf of intervenors American Export Lines, Inc., American Stevedores, Inc., Anchor Terminal Service Co. Inc., Atlantic Stevedoring Co. Inc., Bay Ridge Operating Co. Inc., Bull-Insular Line, Inc., John T. Clark and Son, Compania Sud-Americana De Vapores (Chilean Line), The Cunard Steamship Company Limited, Grace Line Inc., International Terminal Operating Co., Inc., Maher Stevedoring Co. Inc., Marra Bros. Inc., Maude/James, Inc., John W. McGrath Corporation, Nederlandch-Amerikaansche Stoomvaart Maatschappij "Holland-Amer-

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

Whether tariffs of rates (not dual rates) authorized by and issued pursuant to a basic Agreement (conference) approved by the Federal Maritime Board were new agreements or modifications of the basic Agreement requiring separate Board approval under section 15 of the Shipping Act, 1916, prior to its amendment on October 3, 1961.

STATUTES INVOLVED

Section 15 of the Shipping Act, 1916, as it read when petitioner's complaint was filed with the Board, is set forth in Appendix A to the petition (pp. 16-17). Section 15 as amended by section 2 of the Act of October 3, 1961, P. L. 87-346, 75 Stat. 762, is set forth in Appendix A to this brief, *infra*, pp. 1a-3a.

STATEMENT

Intervenors operate waterfront terminal facilities in the port of greater New York (JA 2-11)[2] and are parties to Federal Maritime Commission Agreement No. 8005,[3] which

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ika Lyn" (Holland-America Line), Norwegian American Line Agency, Inc., Packet Shipping Corporation, Pioneer Terminal Corporation, Pittston Stevedoring Corp., Rowland and Liesegang, Inc., Seaboard Contracting Company, Inc., Sealand Dock & Terminal Corp., Jules S. Sottnek Company, Inc., Sottnek Terminal Corp., Standard Terminal Stevedoring Inc., Transoceanic Terminal Corporation, The United Port Service Company, Universal Terminal & Stevedoring Corp., and West Coast Line, Inc.

[2] "JA" references are to the Joint Appendix in the Court of Appeals.

[3] Throughout the proceedings below the Agreement was known as Federal Maritime Board Agreement No. 8005. The Commission has succeeded to the Board's functions by virtue of Reorganization Plan No. 7 of 1961, 26 FED. REG. 7704 (1961).

provides for the collective establishment of rates, charges, classifications, rules, regulations and practices for loading and unloading trucks at intervenors' piers (JA 59). Agreement No. 8005 has at all times been approved by the Federal Maritime Board and Commission under section 15 of the Shipping Act, 1916 (39 STAT. 733, as amended, 46 U.S.C. § 814) (JA 11).

Agreement No. 8005 provides in pertinent part:

> "1. That they [intervenors] shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such services. . . ."

Pursuant to this Agreement, intervenors from time to time issued Tariffs Nos. 1, 2, 3, and 4, all of which set forth rates, charges, rules, regulations, and practices for truck loading and unloading at intervenors' piers (JA 12). Tariffs Nos. 3 and 4 were the subject of earlier litigation in the Board between the present petitioners and intervenors; the Board required modifications in the tariffs and, as modified, approved them (*Empire State Highway Transportation Association* v. *American Export Lines*, 5 F.M.B. 565 (1959)). On January 15, 1960, again pursuant to the Agreement, intervenors issued and filed Tariff No. 5, changing the rate levels (JA 23, 50).[4]

Petitioner then filed its complaint with the Board, naming intervenors as respondents, and alleging (1) that "Tariff No. 5 constitutes an agreement or modification of the Agreement [No. 8005] within the meaning of Section 15 of the Shipping Act, 1916, as amended, and may not become effective without the prior approval of the Board"; and (2) that Tariff No. 5 was unlawful in that the rates, charges, and practices therein were excessive, discriminatory, detri-

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[4] Tariff No. 5, like its predecessor tariffs, contains classifications, rules and regulations necessary for its interpretation and application. These classifications, rules and regulations are substantially the same as those in its previously approved predecessor tariffs.

mental to the commerce of the United States, and unjust and unreasonable (JA 1-15). The complaint prayed for suspension of the tariff pending determination of its lawfulness and for an investigation (JA 14).

Before a responsive pleading was filed, petitioner amended this complaint by deleting all allegations that the rates, charges, and practices were excessive, discriminatory, detrimental to commerce, unjust, unreasonable, or otherwise unlawful (JA 17-19). As amended, the complaint alleged merely that Tariff No. 5 was a new agreement or modification of agreement unapproved under section 15 (*id.*). On that ground it prayed that the operation of the tariff be suspended and that respondents be required to submit the tariff for approval as a section 15 agreement (JA 19). The amended complaint contained no suggestion that the Board should not approve the tariff, and the amendment deleted all allegations of grounds upon which a disapproval could have been based. Upon motion of intervenors the Board dismissed the complaint for failure to state a claim upon which relief could be granted.

On judicial review instituted by petitioner, the Court of Appeals affirmed the Board's order, approving 35 years of unbroken administrative construction of section 15 and deliberate Congressional ratification to the effect that tariffs authorized and contempated by an approved basic agreement are not new agreements or modifications of the basic agreement within the meaning of section 15 and do not require separate approval under section 15. As the court recognized, in case a rate or rule in such a tariff should contravene the standards of section 15 the Board had express statutory authority to withdraw its approval of the basic agreement forthwith, "whether or not previously approved by it" (see the second paragraph of old section 15 (pet. 17)).

ARGUMENT

I. THE CASE HAS BEEN RENDERED MOOT AND EMPTIED OF FUTURE SIGNIFICANCE BY THE OCTOBER 3, 1961, AMENDMENT TO SECTION 15

On October 3, 1961, the President signed Public Law 87-346, which, after more than three years of controversial deliberation in both Houses, the aftermath of this Court's decision in *Isbrandtsen Co.* v. *United States*, 356 U.S. 481 (1958), revised the Shipping Act, 1916. Section 2 of Public Law 87-346 rewrote section 15 of the Shipping Act, 1916. It now provides (*infra*, p. 2a):

> ". . . tariff rates, fares, and charges, and classifications, rules and regulations explanatory thereof . . . agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of Section 18(b) hereof. . . ."

This settles, at least for the future, that tariffs issued pursuant to an approved basic agreement or conference do not require separate approval. The new statute thus makes express the construction given by the Board and the Court of Appeals to the old statute and answers the question presented by the petition as the Board and the court below answered it.

1. The amendment renders the case moot. *United States* v. *Alaska Steamship Co.*, 253 U.S. 113 (1920); *Luckenbach Steamship Co.* v. *United States*, 364 U.S. 280 (1960). Even if the tariff required approval under the old law, it no longer requires approval. Petitioner has claimed no damage for the interim between the filing of the tariff and the enactment of the new law, and has alleged no ground upon which the Board could have based a disapproval of the tariff if its approval or disapproval were required

during that interim.[5] In any event, the amendatory statute, which is procedural, may be applied retroactively to the date of filing of the tariff. *Cf. Federal Broadcasting System* v. *FCC*, 239 F. 2d 941 (D.C. Cir. 1956).

2. Mootness aside, the law is clear for the future; and the present case, involving only the construction of the old law, loses whatever public importance it might otherwise have had. Even under the old statute the question presented was not a live issue [illegible] pending case raising the question, and with two arguable exceptions that are not truly exceptions,[6] it is the only litigated case—in court or agency—on the question in the 45-year history of the Shipping Act, despite the existence for at least the past 35 years of a clear and unbroken course of administrative interpretation, discussed hereinbelow (pp. 9-15).

II. EVEN UNDER THE OLD LAW THE PETITION PRESENTED AN ABSTRACT, HYPOTHETICAL QUESTION WITHOUT PRACTICAL CONTENT

Petitioner deliberately amended its complaint to delete every allegation that the rates or tariff rules were discriminatory, excessive, unreasonable, or otherwise unjust or unlawful. The amended complaint, therefore, failed to allege any fact constituting a ground for disapproval of the tariff. Such a complaint was no different from an assertion that the tariff was a section 15 agree-

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[5] Indeed, petitioner deliberately amended its complaint to delete all such allegations (see p. 4, *supra*).

[6] The arguable exceptions are the 1959 case brought by the present petitioner (*Empire State Highway Transportation Association* v. *American Export Lines*, 5 F.M.B. 565 (1959)), of which the present case is, in a sense, merely a continuation, and a 1927 general investigation instituted by the agency on its own motion, in which it first adopted its long standing construction (*Section 15 Inquiry* (*Ex Parte* No. 4), 1 U.S.S.B. 121 (1927)); this was a general investigation and rule-making rather than an adversary litigation.

ment but that the Board should approve it.[7] The Board necessarily dismissed the complaint for failure to state a claim upon which relief could be granted. If the Court were to adopt petitioner's construction of the law and reverse the judgment below, the only result would be to return the case to the Commission to decide whether the tariff should or should not be approved; and the Commission would have no alternative but to approve it, thus leaving the parties in the same position as that in which the Board and the Court of Appeals left them.

There is, therefore, no practical issue before this Court; petitioner was not harmed by the Board's order. Its avowed object (JA 41) in instituting the proceeding was to obtain an advisory opinion on an abstract question of law. This Court has frequently indicated its unwillingness —even its lack of power—to decide such questions.[8]

If after the tariff became effective anyone raised grounds for its disapproval, the Board could and would disapprove the tariff through its power to withdraw approval of the basic Agreement "whether or not previously approved by

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[7] Section 15 was mandatory that filed agreements "shall" be approved, absent reasons for disapproval. Its material provisions were: "the board may by order disapprove, cancel or modify any agreement . . . that it finds to be [1] unjustly discriminatory or [2] unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or [3] to operate to the detriment of the commerce of the United States, or [4] to be in violation of this Act, and *shall approve all other agreements, modifications, or cancellations.*" [Numerals and emphasis supplied].

[8] E.g., *California* v. *San Pablo & Tulare R.R.*, 149 U. S. 308 (1893); *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Willing* v. *Chicago Auditorium Ass'n*, 277 U.S. 274 (1928); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118 (1939); *Tileston* v. *Ullman*, 318 U.S. 44 (1943); *Poe* v. *Ullman*, 367 U.S. 497 (1961); cf. *Cover* v. *Schwartz*, 133 F. 2d 541, 543-547 (2d Cir.), *cert. denied*, 319 U.S. 743 (1943).

it."[9] This was fully as efficacious as a power of approval over tariffs upon filing; upon a showing of good cause the Board would grant interlocutory relief immediately upon the filing of a complaint alleging that the tariff contravened one or more of the standards under which the validity of section 15 agreements was judged.[10] Thus, in practical terms, the issue in this case is merely whether the old section 15 required automatic suspension of conference tariffs pending approval, which in the absence of a showing of grounds for disapproval would be a mere formality, or whether such tariffs could lawfully become effective upon filing, subject to immediate withdrawal of approval upon such a showing.

III. THE DECISION BELOW IS CLEARLY CORRECT

Petitioner's construction of the Shipping Act, 1916, wrenches a single clause out of context and uses it to do violence to the rest of the Act, its scheme and purpose, and the manifest intent of Congress. Petitioner's construction would require (a) advance approval of all new conference tariffs before they became effective, and (b) indefinite suspension of new tariffs pending approval. In contested cases suspension could continue for several years, since the Board cannot and does not approve protested section 15 agreements until after a hearing, which may require

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[9] E.g., *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28 (1939); cf. *Contract Routing Restrictions*, 2 U.S.M.C. 220, 227 (1939); *Contract Rates—North Atlantic Freight Conf.*, 4 F.M.B. 98, 106 (1952).

[10] E.g., *Pacific Far-East Line* v. *Pacific Westbound Conference*, FMB Docket No. 915 (orders of September 19 and 26, 1960).

years.[11] The prior approval and indefinite suspension requirements would apply indiscriminately to carriers in the foreign trades, domestic carriers, and "other persons subject to this act," for section 15 cuts across all these.

1. Prior approval and indefinite suspension provisions would make the Shipping Act broader than any federal rate regulatory statute. Under all such statutes, rates may become effective without prior approval and may be suspended only for limited times (the longest being seven months) and only upon a showing of probable unlawfulness and a written agency statement of reasons.[12]

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[11] Petitioner denies (Pet. 13) that a hearing would be required. But the Board's general counsel has given an opinion that a hearing is required (see "MONOPOLY PROBLEMS IN REGULATED INDUSTRIES", HEARINGS BEFORE THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 86TH CONG., 1ST SESS. 53 (1959)); the Board has repeatedly so stated to Congress; and it has in fact regularly held hearings on protested section 15 agreements.

[12] All Federal rate regulatory statutes, of which the Interstate Commerce Act is the prototype, have in common certain characteristics which distinguish them from section 15. All require that rates be "just and reasonable"; forbid, upon pain of criminal penalties and liability for reparations, deviation from filed rates; require prior notice for changes in filed rates; permit suspension of rate changes, but only for a specified period of time, after which the rates go into effect whether or not approved, and only upon a finding, for stated reasons, of probable violation. Section 15 contains none of these provisions. See, *e.g.*, sections 6(1), 6(7), 15(1), and 15(7) of the Interstate Commerce Act, Part I (24 STAT. 380, 384, 44 STAT. 1447, as amended, 49 U.S.C. §§ 6(1), 6(7), 15(1), 15(7)); sections 216(e) and (g) and 217(b) and (d) of the Interstate Commerce Act, Part II (49 STAT. 558, 560, 49 U.S.C. §§ 316(e), (g), 317(b), (d)); sections 306(a) and (c) and 307(b) and (g) of the Interstate Commerce Act, Part III (54 STAT. 935, 937, 49 U.S.C. §§ 906(a), (c), 907(b), (g)); sections 405(a) and (c) and 406(b) and (e) of the Interstate Commerce Act, Part IV (56 STAT. 287, 288, 49 U.S.C. §§ 1005(a), (c), 1006(b), (e)); sections 403 and 1002(d) and (g) of the Federal Aviation Act of 1958 (72 STAT. 758, 788, 49 U.S.C. §§ 1373, 1482(d), (g)); sections 4 and 5 of the Natural Gas Act (52 STAT. 882, 15 U.S.C. §§ 717c, 717d); sections

The Shipping Act is narrower, not broader, than such statutes. Congress conferred suspension powers for the first time under any statute, in the Mann-Elkins Act of 1910 (36 STAT. 551, 49 U.S.C. § 15(7)), amending the Interstate Commerce Act just two years before the Alexander investigation that led to the Shipping Act. The suspension power was adopted instead of a proposed requirement for ICC approval of all rates before they became effective; prior approval was rejected as too radical (1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 59 n. 61 (1936); see S. 6737, 61ST CONG., 2D SESS., (1910)).

Congress did not then almost immediately write a prior approval provision into the Shipping Act. Indeed, it deliberately rejected even the less stringent regulation of the Interstate-Commerce-Act type and required no advance filing of tariffs, no suspension, and no regulation of the level of rates in the foreign trade. The draftsmen thus explained the bill to the House Committee ("REGULATORY FEATURES OF THE SHIPPING BILL", HEARINGS BEFORE THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES ON H.R. 14337, 64TH CONG., 1ST SESS. 12 (1916)):

> "The law, however, does not provide that the board shall require carriers by water in foreign commerce to file their rates or tariffs. Experience will show whether it is practicable and desirable to require ocean carriers in the foreign trade to file their rates and to charge only such rates as have been filed with the Government. This difference between the pending measure and the present interstate commerce law is of present importance. This bill, if enacted into law, will provide a very different kind of regulation, by the

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205 and 206 of the Federal Power Act (49 STAT. 851, 16 U.S.C. §§ 824d, 824e); sections 203 and 204 of the Federal Communications Act (48 STAT. 1070, 47 U.S.C. §§ 203, 204); section 306 of the Packers and Stockyards Act (42 STAT. 164, 7 U.S.C. § 207); and sections 2, 3, and 4 of the Intercoastal Shipping Act, 1933 (47 STAT. 1425, 52 STAT. 964, 46 U.S.C. §§ 844, 845, 845a).

> shipping board, over the rates of ocean carriers, than the Interstate Commerce Commission exercises over carriers by rail. In the case of carriers by rail, their rates must be published and filed with the commission: only the published rate may be charged; no change in the rate, up or down, may be made except upon 30 days' notice to the Government, and any important increase in rates may be suspend [sic] by the Interstate Commerce Commission; thus giving the commission practical control over the rates of the railroads. There is no such proposition contained in the proposed measure."

The House Committee first conceived and then abandoned a plan to regulate the level of shipping rates in the foreign trade (see H.R. 14337, 64th Congress). Even this regulatory proposal contained no advance filing requirement and no suspension powers; rates could be set aside only after becoming effective if found to be unreasonably high. In the end, with respect to the foreign trades, the Committee deleted even this provision from the bill.

Having abandoned rate regulation and decided not to require advance filing or approval of rates, Congress did not insert such provisions *sub silentio* into section 15, which regulates conferences. Section 15 in its final form was in the proposed legislation from the beginning of the legislative process. The draftsmen made clear that conferences were to be subject to no greater or different rate regulation than non-conference operators (HEARINGS, *supra*, at 17):

> "DR. JOHNSON. . . . The powers conferred by this bill upon the proposed shipping board are purely corrective powers as regards rates. They are not powers to prescribe, ab inito [sic], a scheme of rates or a system of rates to prevail in the field of ocean transportation. The line carriers, or individual shipowners, will go ahead after this law is passed and work out their own rates, and will not even be obliged

to file them with the Government unless they are joint rates.

"MR. HARDY. That is, you mean unless they are conference rates?

"DR. JOHNSON. No; unless they are joint interline rates over two connecting water carriers."

2. Petitioner's construction would also obliterate distinctions, carefully preserved by the Shipping Act, between the domestic and foreign trades. Under the Act, as amended by the Intercoastal Shipping Act, 1933 (47 STAT. 1425, 46 U.S.C. 844), the Board (now the Commission) has rate regulatory powers of the Interstate-Commerce-Act type over the offshore domestic trades. In these trades the statute requires adherence to filed rates and 30 days' advance notice of rate changes, gives the Board power to fix maximum and minimum rates, and confers suspension powers. But the suspension powers may be exercised only upon a statement in writing of reasons, and the maximum duration of suspension is four months. In enacting these provisions in 1933 Congress was conscious that section 15 required no rate filings and permitted no suspension; one of the stated reasons for the new law was that "Conference agreements have frequently failed to stabilize rates, and from time to time rates have fluctuated without notice . . ." (H. REPT. No. 2006, 72d CONG., 2d SESS. 4 (1933)). If the conference rates were section 15 agreements, they could not have "fluctuated without notice".

3. The conclusions from the structure and legislative history of the statute are reinforced by an unbroken course of administrative practice and construction, repeatedly announced to Congress during reenactments of the Shipping Act, and of section 15 in particular. Hundreds of thousands of conference rates have been put into effect without prior approval; the Board itself published rates in this manner while an important steamship operator and

conference member. In *Section 15 Inquiry (Ex Parte No. 4)*, 1 U.S.S.B. 121, 125 (1927), it announced that conference tariffs are not section 15 agreements, and published regulations so providing (6 Fed. Reg. 6410, 46 C.F.R. § 22.16). Shortly afterward, Congress comprehensively reviewed and amended the Shipping Act, in the Merchant Marine Act, 1928 (45 Stat. 690, 46 U.S.C. § 891), without touching section 15.

The enactment of the Intercoastal Shipping Act, 1933, again without affecting section 15, was predicated in part upon the effects—as to the domestic trade—of the administrative practice of permitting tariffs to go into effect without approval (see page 12, *supra*).

In *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470, 500-503 (1935), the Board promulgated regulations (22 Fed. Reg. 1017, as amended, 46 C.F.R. § 235.1) requiring the filing of tariffs of export rates 30 days *after* their effective date. The regulation applied to conferences. If section 15 approval of conference tariffs were contemplated, the filing would have had to precede, not follow, the effective date, and the regulation would have been surplusage as to conferences. The Board called attention to these regulations in its 1935 and 1936 annual reports to Congress,[13] while it was involved in the comprehensive revision of shipping and merchant marine laws from which emerged the Merchant Marine Act, 1936. Again section 15 was untouched.

In the intensive deliberations leading to the October 3, 1961, amendments, Congress studied the Board's practices in approving section 15 agreements and had before it testimony of the Chairman of the Board pointing out that there were no provisions for advance filing or suspension of tariffs in the foreign trade, including conference tariffs.

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[13] Annual Report of the United States Maritime Commission, 1936, 16; Annual Report of the Secretary of Commerce, 1935, 191.

With this information, Congress twice enacted interim legislation to preserve the status quo with respect to dual rate agreements, pending a decision on permanent legislation (Act of August 12, 1958, P.L. 85-626, 72 STAT. 574; Act of June 29, 1960, P.L. 86-542, 74 STAT. 253 (46 U.S.C. § 812)). In neither amendment did it do anything to alter the administrative construction. The permanent legislation of October 3, 1961, as we showed above (p. 5), expressly enacted the administrative practice.

4. Section 15 exempts approved agreements from the Sherman Antitrust Act; the requirement of Board approval is a substitute for Sherman Act regulation. The Board's function under section 15 is to weigh the disadvantages to the public interest from an antitrust exemption against the advantages which Congress found inhere in steamship conferences.[14] This weighing process can be as effectively performed when the Board decides whether to approve the basic Agreement as when a tariff is filed thereunder. The Board is aware of both the Shipping Act benefits and th. antitrust problems when the basic agreement is filed.[15] The antitrust problem lies in the concerted rate-making, not in the particular rates so made. But the provision for concerted rate making appears in the basic Agreement; the filing of the tariff adds nothing to the Board's knowledge and ability to weigh the relevant factors. It follows that

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[14] See H. Doc. No. 805, 63D CONG., 2D SESS. 416 (1914) (the Alexander Report).

[15] In the present case, the Board has previously required modifications in the basic agreement reflecting antitrust and other basic public interest considerations, namely, (1) the filing and publishing of tariffs (JA 60); (2) strict adherence to tariffs (JA 59); (3) free entry into the conference by any terminal operator (JA 60); (4) free withdrawal from the conference on 30 days notice (JA 60); and (5) maintenance of just and reasonable rates, charges, classifications, regulations, and practices (JA 59). *Empire State Highway Transp. Ass'n* v. *American Export Lines*, 5 F.M.B. 565, 591, 592, 595-6 (1959).

the tariff is not the kind of "agreement" contemplated by section 15.

IV. THERE IS NO CONFLICT

Petitioner's assertion (pet. 7) that the Court of Appeals "overlooked" or "misread" *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), is gratuitous. The case was not cited to the Court of Appeals, and its omission was an accurate reflection of its irrelevance. That case, under the Natural Gas Act, involved an agreement between the maker of the rates and a user of the service subject to the rates—not, as in the present case, an agreement between parties making rates in conference. The Court did not suggest that the validity of the agreement depended in any way upon FPC approval. The Natural Gas Act has no provision analogous to section 15 of the Shipping Act, and unlike the Shipping Act, contains conventional provisions for the suspension and regulation of rates.

There is no intra-circuit conflict, even if such a conflict warranted review by this Court. Judge Fahy, who wrote the opinion below, also sat on the court which decided *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D.C. Cir.), *cert. denied* sub nom. *Japan-Atlantic & Gulf Conf.* v. *United States*, 347 U.S. 990 (1954). His opinion points out (pet. 24) that the two cases differ in degree. The *Isbrandtsen* case involved a tariff of contract non-contract dual rates, which affected the competitive structure of the trade as between carriers, and hence altered the balance between antitrust considerations and the advantages of conference rate making. The tariff of single rates involved here has no such effect on the balance of considerations.

CONCLUSION

For the reasons stated it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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October 20, 1961

APPENDIX A

Section 15 of the Shipping Act of 1916, as amended by section 2 of the Act of October 3, 1961, P.L. 87-346, 75 Stat. 763, reads as follows:

> "Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.
>
> "The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements

between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both

inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."